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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Kelvin D. Daniel, et al.	)	
	)	
Plaintiffs,	)	<b>Case No.: 2:11-CV-01548-ROS</b>
	)	
vs.	)	
	)	
Swift Transportation	)	<b>PLAINTIFFS' OPPOSITION TO</b>
Corporation,	)	<b>DEFENDANT'S RENEWED PARTIAL</b>
	)	<b>MOTION TO DISMISS COUNTS ONE</b>
	)	<b>THROUGH THREE OF PLAINTIFFS'</b>
Defendant.	)	<b>COMPLAINT</b>
	)	

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1 **I. OVERVIEW**

2 The Federal Fair Credit Reporting Act (FCRA), 15  
3 U.S.C. §1681, *et seq.*, imposes strict and often complex  
4 requirements on an entity that uses a "consumer report"  
5 (e.g. a criminal records background check or a credit  
6 report) for an employment purpose.  
7

8 When a potential employer intends to use a report  
9 it must provide disclosure of the intended use to the  
10 consumer about whom the report will be obtained and  
11 obtain authorization from the consumer-employee. 15  
12 U.S.C. § 1681b(b) (2). Thereafter, before the employer  
13 may contemplate using a derogatory report to take an  
14 "adverse action" (e.g. delay, deny or terminate  
15 employment), it must advise the applicant of that  
16 possibility and provide a copy of the subject report.  
17  
18 15 U.S.C. §1681b(b) (3) (A). For some trucking  
19 companies, in lieu of this "pre-adverse action" notice  
20 and report, the employer must advise the applicant that  
21 a job rejection was because of the report and of their  
22 rights to obtain the report and dispute inaccurate  
23 information in it. 15 U.S.C. §1681b(b) (3) (B). The  
24 First Amended Complaint (FAC) (Dkt. No. 19) plausibly  
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1 alleges that Defendant willfully failed to comply with  
2 each of these requirements.

3 **II. BACKGROUND**

4  
5 Congress enacted the Fair Credit Reporting Act  
6 ("FCRA") in 1970 to better ensure that consumer reports  
7 were accurate and to protect consumers from their  
8 arbitrary use:  
9

10 Employers were placing increasing reliance on  
11 consumer reporting agencies to obtain  
12 information on the backgrounds of prospective  
13 employees. Congress found that in too many  
14 instances agencies were reporting inaccurate  
15 information that was adversely affecting the  
16 ability of individuals to obtain employment.  
17 As Representative Sullivan remarked, "with the  
18 trend toward ... the establishment of all  
19 sorts of computerized data banks, the  
20 individual is in great danger of having his  
21 life and character reduced to impersonal  
22 'blips' and key-punch holes in a stolid and  
23 unthinking machine which can literally ruin  
24 his reputation without cause, and make him  
25 unemployable." 116 Cong. Rec. 36570 (1970)."

21 *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d  
22 409, 414 (4th Cir. 2001). These consumer oriented  
23 objectives support a liberal construction of the FCRA.  
24 *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329,  
25 1333 (9th Cir. 1995).  
26

27 In soliciting and considering employees, Swift  
28 Transportation ("Swift") obtains and uses consumer

1 reports containing personal information, employment  
2 histories and criminal record histories. The use of  
3 these consumer reports is not without legal limit as  
4 the FCRA imposes a rigorous regime that restricts the  
5 use of employment reports, including in the trucking  
6 industry, to limited circumstances and on very defined  
7 terms.  
8

9  
10       Though proof of "inaccuracy" is not a necessary  
11 element of the specific FCRA claims alleged in this  
12 case, the consumer reports obtained and then later used  
13 by Swift regarding the Plaintiffs were materially  
14 inaccurate. This is likely true for a large number of  
15 consumers who were the subject of an employment report  
16 obtained and used by Swift as such employment reports -  
17 usually lacking social security matches and other more  
18 sophisticated data found in conventional credit reports  
19 - are historically inaccurate.<sup>1</sup> For some consumers,  
20 like the named Plaintiffs, the FCRA provides a remedy  
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25 <sup>1</sup> See e.g. [http://abcnews.go.com/Technology/background-](http://abcnews.go.com/Technology/background-check-wrongly-ids-job-applicant-sex-offender/story?id=14405696#.Ttk1bkpLofI)  
26 [check-wrongly-ids-job-applicant-sex-](http://abcnews.go.com/Technology/background-check-wrongly-ids-job-applicant-sex-offender/story?id=14405696#.Ttk1bkpLofI)  
27 [offender/story?id=14405696#.Ttk1bkpLofI](http://abcnews.go.com/Technology/background-check-wrongly-ids-job-applicant-sex-offender/story?id=14405696#.Ttk1bkpLofI) last visited  
28 December 8, 2011 ("We see lots and lots of examples of background checks done wrong," said Dietrich, who noted

1 and means to correct material inaccuracies in their  
2 employment reports.

3       However, even for consumer who may suffer a  
4 derogatory, but accurate report, the FCRA employment  
5 report rights are important. *Williams v. Telespectrum,*  
6 *Inc.*, CIV.A.3:05CV853, 2007 WL 6787411 (E.D. Va. June  
7 1, 2007). ("The statute contemplates a wide range of  
8 responses beyond correcting inaccuracy-to 'discuss' the  
9 report, or to 'otherwise respond.' ")

### 12 **III. Legal Argument**

#### 14 **A. The FAC plausibly alleges violations of the** 15 **FCRA.**

16       The Plaintiffs each assert claims against Swift in  
17 its capacity as a "user" of employment purposed<sup>2</sup>  
18 background checks - consumer reports in FCRA parlance.  
19 See 15 U.S.C. § 1681a(d). Section 1681b(b) prohibits  
20 the use of a consumer report for employment decisions  
21 until and unless the employer has complied with the  
22 provisions strict mandates. Plaintiffs allege that  
23 Swift unlawfully obtained and used consumer reports  
24 about job applicants without first providing an FCRA  
25 "Employment purposes" relate to the "evaluation of a  
26 consumer for employment, promotion, reassignment or  
27 retention" as an employee. 15 U.S.C. § 1681a(h).  
28

1 compliant notice or obtaining a proper authorization  
2 from each applicant. (Doc. 19, ¶30); 15 U.S.C. §  
3 1681b(b)(2). Further, Plaintiffs allege that Swift  
4 willfully ignored its obligation to provide rejected  
5 applicants an explanation that they were not hired  
6 because of their consumer report and notice of the FCRA  
7 rights and dispute remedies available to them. (Dkt.  
8 No. 19 at ¶31); 15 U.S.C. § 1681b(b)(3).

11 Most employment applications or positions fall  
12 within the purview of § 1681b(b)(2)(A)(i), which  
13 requires that an employer provide a clear and  
14 conspicuous disclosure in writing **before** procuring the  
15 report. This section also requires the employer to  
16 obtain a written authorization from the job applicant  
17 after making the disclosure and before obtaining the  
18 report. 15 U.S.C. § 1681b(b)(2)(A)(ii); see also  
19 *Reardon v. Closetmaid Corp.*, CIV.A. 08-1730, 2011 WL  
20 1628041 (W.D. Pa. Apr. 27, 2011).

24 An employer's obligation to obtain the  
25 applicant's authorization "before the report is  
26 procured" is unambiguous and has a clear meaning. *Id.*

1        However, the "Clear and Conspicuous" stand-alone  
2 disclosure and "Written Authorization" requirements  
3 found under § 1681b(b)(2)(A)(i) and (ii) do not apply to  
4 applicants seeking a trucking position by mail,  
5 telephone, computer or other similar means. Rather  
6 this narrow category of not-in-person trucking  
7 applicants is entitled to receive notice and provide  
8 authorization in writing, **orally, or electronically**.  
9  
10 See 15 U.S.C. § 1681b(b)(2)(B). The oral, written or  
11 electronic notice that a consumer report will be  
12 obtained is coupled with a requirement that the  
13 employer notify the applicant of a right to receive a  
14 free copy of the consumer report provided by the CRA  
15 within 60 days **and** a right to dispute the accuracy and  
16 completeness of the report. *Id.* Most important, **after**  
17 receiving these notifications, the applicant must  
18 likewise authorize in writing, orally or electronically  
19 the procurement of the consumer report. See 15 U.S.C.  
20 § 1681b(b)(2)(B)(ii).

21        In addition to providing applicants with consumer  
22 rights regarding the procurement of a consumer report  
23 for employment purposes, § 1681b also affords certain  
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1 rights when adverse action is taken based in whole or  
2 in part on the report. See 15 U.S.C. § 1681b(b)(3).  
3 Like the provisions of § 1681b(b)(2), § 1681b(b)(3)  
4 distinguishes between trucking applicants with in-  
5 person contact and those who apply by mail, telephone,  
6 computer or other similar means. As to in-person  
7 applicants, § 1681b(b)(3)(A) provides that **before**  
8 taking adverse action based on the consumer report, the  
9 employer must provide the applicant: (1) with a copy of  
10 the report, and (2) a written statement of rights  
11 prescribed by the Federal Trade Commission under §609  
12 of the FCRA. Conversely, for trucking applicants who  
13 apply via mail, telephone, computer or other similar  
14 means, the employer must provide the applicant, within  
15 three (3) days of taking adverse action, an oral,  
16 written or electronic notification:  
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- 22 1. that adverse action was taken in whole or  
23 in part on the report received from a  
CRA;
- 24 2. of the name, address and telephone number  
25 of the CRA that furnished the report;
- 26 3. that the CRA did not make the adverse  
27 decision and cannot provide the applicant  
28 with a specific reason the adverse action  
was taken; and



1           4.    that the consumer may, upon providing  
2               proper identification, request a free  
3               copy of the report and dispute with the  
4               CRA the accuracy or completeness of the  
5               report.

6           Lastly, as with § 1681b(b)(2)(B), § 1681b(b)(3)(B)  
7           provisions apply only if the applicant has had no in-  
8           person contact with the employer **prior** to the  
9           procurement of the report.

10           **B.   Dismissal of Daniel from Counts One and Two is**  
11           **premature and would be erroneous.**

12           The FAC alleges that Daniel applied for employment  
13           with Swift on-line (Dkt. No. 19 at ¶9), but had in-  
14           person contact with Swift prior to Swift procuring his  
15           consumer report (Dkt. No. 19 at ¶11). Under such  
16           circumstances, Daniel would have been entitled "in-  
17           person" application protections under §  
18           1681b(b)(2)(A) and §1681b(b)(3)(A). Swift argues,  
19           however, that Daniel's "in-person" claims should fail  
20           because Swift procured Daniel's consumer report prior  
21           to the orientation. (Dkt. No. 24 at P.5, lns. 1-4).  
22           In support of this argument, Swift attaches an  
23           unauthenticated one page document from USIS Commercial  
24           Services, Inc. dated December 28, 2010. Though Swift  
25           may attach documents to its motion to dismiss, the  
26           unauthenticated one page document from USIS Commercial  
27           Services, Inc. dated December 28, 2010. Though Swift  
28           may attach documents to its motion to dismiss, the

1 Court may not consider documents that have questionable  
2 authenticity and are relied upon by a pleading. *Kaprov*  
3 *v. Insight Enters.* 2010 U.S. Dist. LEXIS 128621 \*5-6.  
4  
5 Further, a court may not take judicial notice of a fact  
6 that is "subject to reasonable dispute". *Id.* This is  
7 even more equitably true in a case as this one where  
8 Defendant's alleged law-breaking is its failure to  
9 provide the Plaintiff a copy of the very report it now  
10 first discloses in its opposition.  
11

12       Swift would have the Court ignore Plaintiffs'  
13 plausible claim by applying a summary judgment standard  
14 of review in appropriate at this state of the  
15 proceedings. See *Shapiro v. Matrixx Initiatives, Inc.*,  
16 2011 U.S. Dist. LEXIS 111159 (D.Ariz.Sept. 26, 2011)  
17 (citing *Iqbal*, 129 S. Ct. at 1949) ("A claim has facial  
18 plausibility when the plaintiff pleads factual content  
19 that allows the court to draw the reasonable inference  
20 that the defendant is liable for the misconduct  
21 alleged"). Indeed, Plaintiffs dispute that the  
22 attachment is a consumer report as it does not provide  
23 any consumer report data and rather merely makes  
24 reference to a "Widescreen Package Product Request  
25  
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1 Information" **request** on December 28, 2010. A report  
2 typically indicates at a minimum that no results were  
3 found or contains information regarding a purported  
4 criminal background. Compare *Smith v. Waverly Ptnrs.,*  
5 *LLC*, 2011 U.S. Dist. LEXIS 90135 (W.D.N.C. Aug. 12,  
6 2011) ("Plaintiff's name, Social Security Number, prior  
7 addresses, date of birth, and driver's license  
8 information...does not bear on any of the seven  
9 enumerated factors in § 1681a(d), and is thus not a  
10 consumer report") with *Swift's Answer to Plaintiff's*  
11 *First Amended Complaint* (Dkt. No. 23 at ¶29, "Swift  
12 admits that it has obtained criminal background reports  
13 from consumer reporting agencies during the last few  
14 years.")

15 The FAC also alleges that Swift took adverse  
16 action against Daniel by dismissing him from  
17 orientation based upon information received in a  
18 consumer background report. (Dkt. No. 19 at ¶13)  
19 Because the protections afforded under § 1681b(b)(2)(A)  
20 and § 1681b(b)(3)(A) hinge on when Swift procured the  
21 consumer report, Plaintiffs should be provided an  
22 opportunity to conduct discovery to determine if the

1 attachment is in fact a true and correct copy of the  
2 alleged consumer report used by Swift to terminate  
3 Daniel. Indeed, dismissal of Daniel's claim is  
4 premature at best; rather at worst, Daniel would be  
5 reclassified as a non-in-person applicant if discovery  
6 yields information consistent with Swift's theory.<sup>3</sup>  
7

8  
9 Moreover, even if the attachment is a consumer  
10 report, discovery should be conducted to determine why  
11 Swift would procure applicants' consumer reports, be  
12 aware of negative content, and still haul applicants  
13 from across the country to attend orientation only to  
14 send them home midstream. This conduct also begs for  
15 fact discovery, including what incentive, if any, Swift  
16 has to drag applicants like Daniel across the United  
17 States to attend orientation only to send them home  
18 based on consumer reports procured prior to the  
19 orientation. (Dkt. No. 32 at ¶13, "Swift admits that  
20 it did not hire Daniel and that Daniel was dismissed  
21 from orientation.").

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25 <sup>3</sup> Defendant's timing allegation are also inconsistent  
26 with the FAC allegation that the Plaintiff's  
27 disqualification did not occur until after he had been  
28 asked to and allowed to attend employment orientation.  
If the disqualifying report was obtained before, a  
fact-finder could reasonably conclude that the employer  
had not yet "used" the disqualifying report.

1           **C. Bell could not authorize the procurement of a**  
2           **consumer report if he was never advised that**  
3           **such a report would be procured.**

4           Conceding the plausibility of almost all of  
5 Plaintiffs' remaining claims, Swift presents only one  
6 other argument in support of its motion for partial  
7 dismissal Mr. Bell's claim. Defendant argues that it  
8 did not violate § 1681b(b)(2)(B) as to Bell because it  
9 obtained his signature following the barely legible  
10 text at the end of his application. That text would  
11 have advised a comprehending reader that he or she was  
12 giving to Swift, "the right to investigate all  
13 references and to secure additional information about  
14 me, if job-related." Dkt. No. 19-2 at 3. Nothing more.  
15 It never mentions, informs or suggests the involvement  
16 of a federally regulated consumer reporting agency. It  
17 never mentions the phrase "consumer report" much less  
18 advises Bell that he could obtain a free copy of the  
19 consumer report and dispute its accuracy.  
20 §1681b(b)(2)(B)(i). Defendant's logic - its suggestion  
21 that because the language is so broad it should catch  
22 every possible type of information, including FCRA  
23 governed data - ignores the important remedial purposes  
24  
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1 for the FCRA rights and protections. It could just as  
2 well have stated: "You agree that we can do anything  
3 at all to evaluate your application." That  
4 authorization would be just as all broad, and just as  
5 ineffective.  
6

7 Swift's entire argument is rooted in its  
8 misconception that Congress somehow "relaxed" FCRA  
9 compliance in 1998 when retooling disclosure and  
10 authorization requirements for truck drivers. Rep.  
11 LaFalce explained the amendments: "The legislation  
12 would add several narrowly crafted exceptions to FCRA  
13 that would permit - where employment applications are  
14 taken by phone, mail or electronically - greater  
15 flexibility in providing required disclosures and  
16 authorizations either by 'oral, written or electronic  
17 means'" In short, the content of the disclosure and  
18 the veracity of the authorization remained intact; only  
19 the means by which the information is communicated was  
20 affected. Lynne B. Barr & Barbara J. Ellis, *The New*  
21 *Fcra: An Assessment of the First Year*, 54 Bus. Law.  
22 1343, 1349 (1999) ("The 1998 Amendments drew a very  
23 narrow exception to this requirement, and now permit  
24  
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1 certain employers to provide the prior disclosure and  
2 obtain the prior authorization orally or electronically  
3 if there has been no "in-person" contact before the  
4 consumer report is procured.")

5  
6 Swift argues that its application contains the  
7 necessary verbiage to constitute a general, limitless  
8 authorization to obtain any information from any source  
9 regarding applicants. Notably, Swift provides no  
10 authority for such an untenable position, as none  
11 exists. Consumer reports are a unique species of  
12 personal information, and are subject to federal  
13 regulation in part due to the notoriously convoluted  
14 way they are prepared. Thus notification of one's  
15 right to receive a copy of the consumer report together  
16 with notice of the right to dispute its accuracy  
17 remains paramount to the application and screening  
18 process.

19  
20 The FCRA treats the disclosure of these rights as  
21 a condition precedent to a consumer's authorization.  
22 See generally *Lagrassa v. Gaughen*, 2011 U.S. Dist.  
23 LEXIS 34323 (M.D. Pa. Mar. 30, 2011) (in the context of  
24 § 1681b(b)(2)(A), "before obtaining a consumer report,

1 the employer must first disclose to the potential  
2 employee that the employer may obtain a report **and then**  
3 the employee must authorize, in writing, the  
4 procurement of the report.") Swift baldly asserts that  
5 its application satisfies the requirements of §  
6 1681b(b)(2)(B)(ii), without attempting to address its  
7 failure to notify applicants in accordance with §  
8 1681b(b)(2)(B)(i). Moreover, Swift does so despite the  
9 fact that its purported disclosure does not even use  
10 the terms, "criminal background", "consumer report",  
11 "dispute", "free copy", and "consumer reporting  
12 agency". See *Burghy v. Dayton Racquet Club, Inc.*, 695  
13 F. Supp. 2d 689, 698 (S.D. Ohio 2010) (valid FCRA  
14 disclosure under § 1681b(b)(2)(A) stated certain job  
15 functions "require **credit history checks**, and I  
16 understand **credit-reporting agencies**, credit/bankruptcy  
17 litigation, and **credit reports** may also be included").

#### 23 **IV. Conclusion**

24 Plaintiffs respectfully request that the Court  
25 deny Defendant's Partial Motion to Dismiss.  
26

27 Respectfully Submitted,

28 STUMPHAUZER O'TOOLE MCLAUGHLIN  
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**CERTIFICATE OF SERVICE**

This will certify that a copy of the foregoing Plaintiffs' Response to Defendant's Motion to Dismiss was filed electronically this 8th day of December, 2011. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

/s/ Susan M. Rotkis  
*Counsel for Plaintiffs*